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IN THE MATTER OF	:	DISTRICT ATTORNEY'S OFFICE
	:	
JOHN DESCANO,	:	CHESTER COUNTY, PENNSYLVANIA
Requester	:	
	:	RIGHT TO KNOW APPEAL
v.	:	
	:	FINAL DETERMINATION
WEST BRANDYWINE	:	
TOWNSHIP PD,	:	DA-RTKL-A NO. 2017-003
Respondent	:	

INTRODUCTION

On March 23, 2017, Requester filed a right-to-know request with the Respondent, pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, *et seq.* On March 30, 2017, the request was denied. On April 5, 2017, Requester appealed to the Office of Open Records. On June 14, 2017, the Office of Open Records granted the appeal in part and transferred the appeal in part to the Chester

County District Attorney's Office [AP 2017-0626], which was received on June 19, 2017.

For the reasons set forth in this Final Determination, the appeal is **DENIED** and the Respondent is not required to take any further action.

FACTUAL BACKGROUND

On March 23, 2017, Requester submitted a right-to-know request pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, et. seq., with the Respondent, requesting "report statement of complainant," specifically "what the complainant stated to police about incident May 31, 2016, Citation No. R0307737." On March 30, 2017, the request was denied. The Respondent stated:

Dear Mr. Descano,

We are in receipt of your Right-To-Know request where you requested the report statement of complainant what the complainant stated to the police about an incident On May 31, 2016, Citation No. R0307737-3.

Your Right to Know request is hereby denied pursuant to section 705. The document (Statement of Complainant) that you requested does not currently exist; the written request should identify the records sought with sufficient specificity. If you are seeking a copy of Citation No. R0307737, a copy may be obtained at Honey Brook District Court.

If you are seeking a police report, your right to know request is hereby denied pursuant to sections 708(b)(17) A record of an agency relating to a noncriminal investigation, including subsections, 708(b)(17)(ii) Investigative materials, notes,

correspondence and reports, 708(b)(16)(iv) A record that includes information made confidential by law.

You have the right to appeal the denial of this request to the PA Office of Open Records within 15 days of this notification. Your appeal shall state the grounds upon which you assert the request should be fulfilled.

If you have further questions, please call the Township office or the Pennsylvania Office of Open Records. Otherwise, this letter will close out your request for information under the Right to Know Law.

Respectfully,

Linda Formica
West Brandywine Township Open Records Officer

March 30, 2017 Response of Respondent (Linda Formica).

On April 5, 2017, Requester appealed to the Office of Open Records. On April 17, 2017, the Requester sent the following to the Office of Open Records:

My name is John M. Descano and I've already sent a request to the Office of Open Records on April 5, 2017 for access to documents concerning the statement Jess Sanner gave to the West Brandy wine Police on May 31, 2016 about an incident that happened between him and me. This letter is additional information explain why I'm appealing the denial from West Brandywine Township. (See attached OOR Appeal form.)

I believe the document I'm requesting is not covered under any exemption because the information in the document is about me, the source for the citation #R0307737-3 issued to me for the incident. I need this statement to show the Courts that the statements made by Jess Sanner changed from those he made to the police and those he made in court, which caused me to be falsely accused and convicted.

District Court does not keep a record of what is said in court for what they deem to be non-criminal offenses. During the court hearing, Detective Belski used the police record of Mr. Sanner statement made on May 31, 2016, as his basis for the questions he asked Mr. Sanner about the incident. Mr. Sanner's statement to police compared to what he said in District court, and then what he said in the Court of Common Pleas, are not the same from place to the other. I was told that the statement made to the police at the time of the incident and recorded by the police officer is a legal document and valid to use to defend myself in court. I believe the statement he gave to the police will be substantially different from what he said in the Court of Common Pleas, where there is a record of the court proceedings, of which I have a copy.

In the Court of Common Pleas transcript of the hearing, to prove that I was the aggressor, Mr. Sanner stated I was the one with the problem and he never had problems with anyone else in the township except me. This is false, since court records, Criminal Docket #CP-15-CR-0004831-2011 show he had altercations in the township previously which resulted in him being required to enter and successfully complete an anger management program, a mental health evaluation and recommended treatment, participate in a drug or alcohol treatment program, in addition to jail time and a probation period.

I believe everything in this letter should cover the reasons for why this record should be made public to me. Thank you for your time in reviewing my request.

April 17, 2017 Letter of Requester (John M. Descano) to OOR.

On June 14, 2017, the Office of Open Records granted the appeal in part and transferred the appeal in part to the Chester County District Attorney's Office.

The Office of Open Records stated in part:

1. The Requester's identity is irrelevant

On appeal, the Requester argues that he is entitled to the record because he is the source of the statements made in the police report. However, the RTKL must be construed without regard to the identity of the requester. The reason for requesting a record is not relevant to determining the record's public status. Therefore, the OOR must evaluate the records at issue as if any other member of the public had requested them.

2. The Township has not demonstrated that the record is related to a noncriminal investigation

The Township contends that the record at issue is exempt from disclosure because it is related to a noncriminal investigation. Section 708(b)(17) provides that records "relating to a noncriminal investigation" are protected from disclosure, including "investigative materials, notes, correspondence and reports," 65 P.S. § 67.708(b)(17)(ii), and records that "if disclosed would... reveal the institution, progress or result of an agency investigation, except the imposition of a fine or civil penalty, the suspension, modification or revocation of a license..." 65 P.S. § 67.708(b)(17)(vi). In order for this exemption to apply, an agency must demonstrate that "a systematic or searching inquiry, a detailed examination, or an official probe" was conducted regarding a noncriminal matter. Further, the inquiry, examination, or probe must be "conducted as part of an agency's official duties."

In the present case, the Township did not submit any evidence demonstrating that the record is related to a noncriminal investigation. Section 708 of the RTKL clearly places the burden of proof on the Township to demonstrate that a record is exempt from public disclosure. 65 P.S. § 67.708(a)(1). While an affidavit or statement made under the penalty of perjury is competent evidence to sustain an agency's burden of proof, unsworn statements may not be

relied upon as competent evidence to withhold records under the RTKL. The statements made by the Township in responding to the Request are not competent evidence to support its burden of proving that the report is exempt under Section 708(b)(17). Therefore, the Township has not met their burden under the RTKL. *See* 65 P.S. § 67.305.

3. The appeal is transferred to the extent the Request seeks a record related to a criminal investigation

The Township also argues that the report relates to a criminal investigation, and is exempt from access under Section 708(b)(16) of the RTKL. Section 708(b)(16) of the RTKL exempts from disclosure “[a] record of an agency relating to or resulting in a criminal investigation.” 65 P.S. § 67.708(b)(16). The OOR lacks jurisdiction to consider whether a record of a local law enforcement agency is subject to public access where the agency claims that the records are withheld as criminal investigative records and either submits evidence demonstrating that a criminal investigation occurred or, based on the appeal documents or the language of the request itself, there is no dispute between the parties regarding the existence of a criminal investigation.

The record sought is a police report which, according to the uncontested description of the Requester, documents an “incident” between the Requester and another party, which resulted in the Requester’s criminal conviction. This description is sufficient to demonstrate that the citation relates to a criminal investigation under Section 708(b)(16).

The Township is a local law enforcement agency. Pursuant to 65 P.S. § 67.503(d)(2), only the Appeals Officer for the Chester County District Attorney’s Office (“DA’s Office”) is authorized to “determine if the record requested is a criminal investigative record” of a local law enforcement agency within Chester County. Accordingly, the OOR lacks jurisdiction to assess whether the Township has proven by a preponderance of the evidence that the withheld report is, in

fact, exempt under Section 708(b)(16) of the RTKL. Consequently, the appeal is hereby transferred to the Appeals Officer for the DA's Office. A copy of this final order and the appeal filed by the Requester will be sent to the Appeals Officer for the DA's Office.

CONCLUSION

For the foregoing reasons, Requester's appeal is **granted in part** and **transferred in part** to the Appeals Officer for the DA's Office, and the Township is required to provide all responsive records to the Requester upon a finding that the records are not related to a criminal investigation. This Final Determination is binding on all parties. Within thirty days of the mailing date of this Final Determination, any party may appeal to the Chester County Court of Common Pleas. 65 P.S. § 67.1302(a). ...

In the Matter of John Descano v. West Brandywine Township, Docket No. AP-2017-0626 (citations omitted) (footnotes omitted), at 4-7.

On June 19, 2017, this Appeals Officer for the Chester County District Attorney's Office gave Notice to the parties of the following:

On March 23, 2017, Requester filed a right-to-know request with the Respondent, pursuant to the Right to Know Law ("RTKL"), 65 P.S. § 67.101, *et. seq.*. On March 30, 2017, the request was denied. On April 5, 2017, Requester appealed to the Office of Open Records. On June 14, 2017, the Office of Open Records granted the appeal in part and transferred the appeal in part to the Chester County District Attorney's Office [AP 2017-0626], which was received on June 19, 2017.

Unless the Requester agrees otherwise, as the appeals officer, I shall make a final determination, which shall be mailed to the Requester and the Respondent, **within 30 days of June 19, 2017, which is July 19, 2017.** 65 P.S. § 67.1101(b)(1). If a final determination is not made within 30

days, the appeal is deemed denied by operation of law. 65 P.S. § 67.1101(b)(2). Prior to issuing a final determination, a hearing may be conducted. However, a hearing is generally not needed to make a final determination. The final determination shall be a final appealable order, and shall include a written explanation of the reason for the decision. 65 P.S. § 67.1101(b)(3).

The Supreme Court of Pennsylvania has held that a Respondent is permitted to assert exemptions on appeal, even if the agency did not assert them when the request was originally denied. Levy v. Senate of Pennsylvania, 619 Pa. 586, 65 A.3d 361 (2013).

The Commonwealth Court of Pennsylvania has held that, pursuant to 65 P.S. § 67.1101(a), the appeal shall state the grounds upon which the Requester asserts that the record is a public record and shall address any grounds stated by the agency for denying the request. When a Requester fails to state the records sought are public, or fails to address an agency's grounds for denial, the appeal may be dismissed. Padgett v. Pennsylvania State Police, 73 A.3d 644 (Pa. Cmwlth. 2013); Saunders v. Department of Correction, 48 A. 3d 540 (Pa. Cmwlth. 2012); Department of Corrections v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011).

If the Respondent wishes to submit a response, it should do so on or before **July 3, 2017**.

If the Requester wishes to submit a response, it should do so on or before **July 10, 2017**.

Any statements of fact must be supported by an Affidavit made under penalty of perjury by a person with actual knowledge. However, legal arguments and citation to authority do not require Affidavits. All parties must be served with a copy of any responses submitted to this appeal officer.

June 19, 2017 Letter of Chief Deputy District Attorney Nicholas J. Casenta, Jr.

Neither the Respondent nor the Requester submitted an additional response. Consequently, this decision is based on the initial request, response, and Office of Open Records filings.

LEGAL ANALYSIS

The Chester County District Attorney's Office is authorized to hear appeals relating to access to criminal investigative records in the possession of a local agency located within Chester County. 65 P.S. § 67.503(d)(2) ("The district attorney of a county shall designate one or more appeals officers to hear appeals under Chapter 11 relating to access to criminal investigative records in possession of a local agency of that county. The appeals officer designated by the district attorney shall determine if the record requested is a criminal investigative record.").

The West Brandywine Police Department ("Respondent") is a local agency subject to the RTKL that is required to disclose public documents. 65 P.S. § 67.302. Records of a local agency are presumed "public" unless the record: (1) is exempt under 65 P.S. § 67.708(b); (2) is protected by privilege; or (3) is exempt from disclosure under any other Federal or State law or regulation or judicial order or decree. 65 P.S. § 67.305.

“Nothing in this act shall supersede or modify the public or nonpublic nature of a record or document established in Federal or State law, regulation or judicial order or decree.” 65 P.S. § 67.306.

The Respondent bears the burden of proving, by a preponderance of the evidence, that the document requested is exempt from public access. 65 P.S. § 67.708(a)(1). A preponderance of the evidence standard is the lowest evidentiary standard. The preponderance of evidence standard is defined as the greater weight of the evidence, *i.e.*, to tip a scale slightly is the criteria or requirement for preponderance of the evidence. Commonwealth v. Brown, 567 Pa. 272, 284, 786 A.2d 961, 968 (2001), *cert. denied*, 537 U.S. 1187, 123 S.Ct. 1351, 154 L.Ed.2d 1018 (2003). “A ‘preponderance of the evidence’ is defined as ‘the greater weight of the evidence ... evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other....’ Black’s Law Dictionary 1301 (9th ed. 2009).” Mitchell v. Office of Open Records, 997 A.2d 1262, 1264 n.3 (Pa. Cmwlth. 2010); *See also* Commonwealth v. Williams, 532 Pa. 265, 284-286, 615 A.2d 716, 726 (1992) (preponderance of the evidence in essence is proof that something is more likely than not). There is sufficient evidence to support the determination that the

documents requested are criminal investigative records and exempt from disclosure.

The RTKL provides that records of an agency relating to or resulting in a criminal investigation, such as investigative materials, notes, correspondence, videos, reports, and records, may be withheld as exempt. 65 P.S. § 67.708(b), titled, “Exceptions for public records”, provides in part as follows:

(b) Exceptions. -- Except as provided in subsections (c) and (d), the following are exempt from access by a requester under this act:

...

(16) A record of an agency relating to or resulting in a criminal investigation, including:

(i) Complaints of potential criminal conduct other than a private criminal complaint.

(ii) Investigative materials, notes, correspondence, videos and reports.

(iii) A record that includes the identity of a confidential source or the identity of a suspect who has not been charged with an offense to whom confidentiality has been promised.

(iv) A record that includes information made confidential by law or court order.

(v) Victim information, including any information that would jeopardize the safety of the victim.

(vi) A record that, if disclosed, would do any of the following:

(A) Reveal the institution, progress or result of a criminal investigation, except the filing of criminal charges.

(B) Deprive a person of the right to a fair trial or an impartial adjudication.

(C) Impair the ability to locate a defendant or codefendant.

(D) Hinder an agency's ability to secure an arrest, prosecution or conviction.

(E) Endanger the life or physical safety of an individual.

This paragraph shall not apply to information contained in a police blotter as defined in 18 Pa.C.S. § 9102 (relating to definitions) and utilized or maintained by the Pennsylvania State Police, local, campus, transit or port authority police department or other law enforcement agency or in a traffic report except as provided under 75 Pa.C.S. § 3754(b)(relating to accident prevention investigations).

65 P.S. § 67.708(b).

18 Pa.C.S.A. § 9102 (relating to definitions) states in part: “**Police blotter.**’

A chronological listing of arrests, usually documented contemporaneous with the incident, which may include, but is not limited to, the name and address of the individual charged and the alleged offenses.”

18 Pa.C.S.A. § 9102 (relating to definitions) states in part: “**Investigative information.**’ Information assembled as a result of the performance of any

inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and may include modus operandi information.”

In Pennsylvania State Police v. Office of Open Records, 5 A.3d 473 (Pa. Cmwlth. 2010), the *en banc* Commonwealth Court found an incident report exempt from disclosure pursuant to 65 P.S. § 67.708(b)(16). The Court held that the incident report was not a public record because the incident report was not the equivalent of a police blotter under the RTKL and the Criminal History Records Information Act (“CHRIA”).

Pursuant to 65 P.S. § 67.708(b)(16), records of an agency are exempt from access by a requester if the records relate to or result in a criminal investigation. When a party seeks to challenge an agency’s refusal to release information by appealing that party must address any grounds stated by the agency for denying the request. Department of Corrections v. Office of Open Records, 18 A.3d 429, 434 (Pa. Cmwlth. 2011); Padgett v. Pennsylvania State Police, 73 A.3d 644, 647-648 (Pa. Cmwlth. 2013).

In Department of Corrections v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011), the Commonwealth Court stated in part:

Consequently, we agree with DOC that when a party seeks to challenge an agency’s refusal to release information by appealing to Open Records, that party must “address any grounds stated by the agency for ... denying the request.” This is a typical requirement in any process that aims to provide a forum for error correction. We do not see it as a particularly

onerous requirement, whether the requester has the benefit of legal counsel or is *pro se*.

DOC v. OOR at 434.

When a party seeks to challenge an agency's refusal to release information by appealing that party must address any grounds stated by the agency for denying the request. The Requester raises the following challenges to the denial:

...

I believe the document I'm requesting is not covered under any exemption because the information in the document is about me, the source for the citation #R0307737-3 issued to me for the incident. I need this statement to show the Courts that the statements made by Jess Sanner changed from those he made to the police and those he made in court, which caused me to be falsely accused and convicted.

District Court does not keep a record of what is said in court for what they deem to be non-criminal offenses. During the court hearing, Detective Belski used the police record of Mr. Sanner statement made on May 31, 2016, as his basis for the questions he asked Mr. Sanner about the incident. Mr. Sanner's statement to police compared to what he said in District court, and then what he said in the Court of Common Pleas, are not the same from place to the other. I was told that the statement made to the police at the time of the incident and recorded by the police officer is a legal document and valid to use to defend myself in court. I believe the statement he gave to the police will be substantially different from what he said in the Court of Common Pleas, where there is a record of the court proceedings, of which I have a copy.

In the Court of Common Pleas transcript of the hearing, to prove that I was the aggressor, Mr. Sanner stated I was the one with the problem and he never had problems with anyone else in the township except me. This is false, since court records, Criminal Docket #CP-15-CR-0004831-2011 show he

had altercations in the township previously which resulted in him being required to enter and successfully complete an anger management program, a mental health evaluation and recommended treatment, participate in a drug or alcohol treatment program, in addition to jail time and a probation period.

...

April 17, 2017 Letter of Requester (John M. Descano) to OOR.

The Requester states that he needs the record because it involves him and it; “caused me to be falsely accused and convicted.” The Requester does not appear to dispute that the record requested is an investigative record. In fact, the Requester’s rendition of the events leading to the creation of the record clearly establishes that it an investigative record. From Requester’s April 17, 2017 Letter there was an incident between him and Jess Sanner. The police investigated. As a result of the investigation, a statement was taken from Mr. Sanner, and a report created. Charges were filed against Requester. Requester was convicted.¹

As previously stated, pursuant to 65 P.S. § 67.708(b)(16), records of an agency are exempt from access by a requester if the records relate to or result in a criminal investigation. When a party seeks to challenge an agency’s refusal to

¹ It is clear from the facts presented by Requester that the requested record is a criminal investigative record. However, I caution the Respondent (West Brandywine Township) that in the future they should not take such a cavalier attitude toward Right to Know Request appeals. The Respondent failed to respond to the Office of Open Records. The Respondent failed to respond to this Appeals Officer. Mere citation to specific exceptions in the statute is generally not sufficient without providing a necessary factual predicate. Any statements of fact must be supported by an Affidavit made under penalty of perjury by a person with actual knowledge.

release information by appealing that party must address any grounds stated by the agency for denying the request. Department of Corrections v. Office of Open Records, 18 A.3d 429, 434 (Pa. Cmwlth. 2011); Padgett v. Pennsylvania State Police, 73 A.3d 644, 647-648 (Pa. Cmwlth. 2013).

Initially it is important to note that a requester's identity and motivation for making a request is not relevant, and his or her intended use for the information may not be grounds for granting or denying a request. *See* 65 P.S. § 67.301(b), 65 P.S. § 67.703. In DiMartino v. Pennsylvania State Police, 2011 WL 10841570 (Pa. Cmwlth. 2011), the Commonwealth Court, in a memorandum opinion,² stated in pertinent part:

As a final point, we note that, the requester's status as representative of Decedent's family has no bearing on whether the requested records are accessible through a RTKL request. We agree with the OOR that the RTKL must be construed without regard to the requester's identity. *See, e.g.*, Section 301(b) of the RTKL, 65 P.S. § 67.301(b) (stating that an agency "may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law"); Weaver v. Dep't of Corr., 702 A.2d 370 (Pa. Cmwlth. 1997) (under the former Right-to-Know Act, the right to examine a public record is not based on whether the person requesting the disclosure is affected by the records or if her motives are pure in seeking them, but whether any person's rights are fixed); Furin v. Pittsburgh Sch. Dist., OOR Dkt. No. AP 2010-0181, 2010 PA OORD LEXIS 212

² DiMartino v. Pennsylvania State Police, 340 C.D. 2011, 2011 WL 10841570 (Pa. Cmwlth. 2011) is an unreported panel decision of the Commonwealth Court. As such, it may be cited for its persuasive value, but not as binding precedent. *See* Section 414 of the Commonwealth Court's Internal Operating Procedures.

(Pa. OOR 2010) (finding records exempt under Section 708(b) regardless of status of person requesting them); Wheelock v. Dep't of Corr., OOR Dkt. No. AP 2009–0997, 2009 PA OORD LEXIS 725 (Pa. OOR 2009) (stating the only information available under the RTKL is a “public record” available to all citizens regardless of personal status or stake in requested information).

DiMartino at *6 (footnote omitted). *See also* Mahoney v. Pennsylvania State Police, 339 C.D. 2011, 2011 WL 10841247 (Pa. Cmwlth. 2011).

In Hunsicker v. Pennsylvania State Police, 93 A.3d 911 (Pa. Cmwlth. 2014), Requester (Hunsicker) appealed a Determination of the Office of Open Records denying her request under the RTKL for access to Pennsylvania State Police records regarding an investigation surrounding her brother’s death, which involved a State Trooper. In affirming the denial, the Commonwealth Court stated in part:

Requestor appealed the PSP’s denial to the OOR contending that she lived with her brother for 35 years, that she was not a member of the general public but his sister, and that she should have special access to the information. The OOR denied her appeal because it failed to address agency grounds for denial of access and the appeal did not challenge the confidentiality of the records under CHRIA. This appeal followed.

On appeal, Requestor first contends that the materials she is requesting are referred to as an “incident” report, not an “investigative” report, implying that those records fall outside of the investigative exemption. An incident report normally refers to a report filed by the responding officers, not the entire investigative file, although, here, it appears that the investigative report was filed at the incident report number. In any event, no matter what is contained in an incident report, incident reports are considered investigative materials and are covered by that exemption. Pennsylvania State Police v. Office

of Open Records, 5 A.3d 473, 479 (Pa. Cmwlth. 2010), *appeal denied*, [621] Pa. [685], 76 A.3d 540 (2013).

Even if the requested records fall within the investigative exception, Requestor contends that she is entitled to those records because she has a special need for them because, as Mr. Rotkewicz's sister, she needs to know what her brother did to cause a PSP Trooper to shoot him and to investigate a possible PSP "cover up." While we are sympathetic to Requestor's desire to understand her brother's death, her status as his sister and her reasons for requesting the records do not render records that fall within the investigative exemption accessible. Under the RTKL, whether the document is accessible is based only on whether a document is a public record, and, if so, whether it falls within an exemption that allows that it not be disclosed. The status of the individual requesting the record and the reason for the request, good or bad, are irrelevant as to whether a document must be made accessible under Section 301(b). *See* 65 P.S. § 67.301(b) (stating that an agency "may not deny a requester access to a public record due to the intended use of the public record by the requester unless otherwise provided by law.").

As a corollary to this argument, Requestor contends that the investigative file should be made accessible because portions of the withheld documents are already known to her, and that if any of the record contains information that falls within an exemption to disclosure, that information should be redacted and the records then be given to her. Again, for the reasons stated above, just because she purportedly knows some of the information contained in the documents is irrelevant as to whether a document must be made accessible. Moreover, her request that the documents be redacted to the extent the records contain exempt information is based on a premise that only certain information is exempt from disclosure when, under the investigative exemption, the entire investigative report falls within the investigative exemption. 65 P.S. § 67.706(b)(16); *see also* Pennsylvania State Police.

Finally Requestor contends that the PSP Trooper who investigated the incident assured her that she would receive that information. Even assuming that the assertion is true, an individual State Trooper does not have the authority to authorize the release of documents or make PSP RTKL determinations pursuant to Section 1102, 65 P.S. § 67.1102.

Hunsicker v. Pennsylvania State Police at 913-914 (footnote omitted).

A criminal investigative record is anything that contains information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing. 18 Pa.C.S.A. § 9102. The size, scope, or formality, of police inquiries are not relevant in determining if something is a criminal investigative record. Whether an arrest has occurred or whether a criminal investigation is ongoing or closed, are not relevant factors in determining if something is a criminal investigative record. Criminal investigative records remain exempt from disclosure under the RTKL even after the investigation is completed. Also, a record is not considered a public record if it is exempt under any other State or Federal Law, including the Criminal History Records Information Act.

Based on the information from Requester's April 17, 2017 Letter it is clear that the record requested is a criminal investigative record. 18 Pa.C.S.A. § 9102 (relating to definitions) states in part: “**Investigative information.**’ Information assembled as a result of the performance of any inquiry, formal or informal, into a

criminal incident or an allegation of criminal wrongdoing and may include modus operandi information.”

In Barros v. Martin, 92 A.3d 1243 (Pa. Cmwlth. 2014), *appeal denied*, 626 Pa. 701, 97 A.3d 745 (2014), the Commonwealth Court stated in part:

Thus, if a record, on its face, relates to a criminal investigation, it is exempt under the RTKL pursuant to Section 708(b)(16)(ii). See Coley v. Philadelphia Dist. Attorney’s Office, 77 A.3d 694, 697 (Pa. Cmwlth. 2013); Mitchell v. Office of Open Records, 997 A.2d 1262, 1264 (Pa. Cmwlth. 2010). ***Criminal investigative records remain exempt from disclosure under the RTKL even after the investigation is completed.*** Sullivan v. City of Pittsburgh, Dep’t of Pub. Safety, 127 Pa. Cmwlth. 339, 561 A.2d 863, 865 (1989).

Also, a record is not considered a public record under Section 102 of the RTKL if it is “exempt under any other State or Federal Law,” including the CHRIA. See Coley, 77 A.3d at 697. Section 9106(c)(4) of the CHRIA, 18 Pa.C.S. § 9106(c)(4), provides that “investigative and treatment information shall not be disseminated to any department, agency or individual unless the department, agency or individual requesting the information is a criminal justice agency.” ***The CHRIA defines “investigative information” as “information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing and may include modus operandi information.”*** Section 9102 of the CHRIA, 18 Pa.C.S. § 9102.

Thus, the records requested by Barros - *i.e.*, the criminal complaint file, forensic lab reports, any confession and record of polygraph of Quinones, the “Communication Center Incident Review,” the “Internal Police Wanted Notice,” “Reports on individual mistakenly apprehended,” and three signed witness statements - are protected from disclosure under both the RTKL

and the CHRIA as records “relating to ... a criminal investigation” and “investigative information,” respectively.

Barros v. Martin at 1250 (emphasis added).

In Padgett v. Pennsylvania State Police, 73 A.3d 644 (Pa. Cmwlth. 2013), the Commonwealth Court stated in part:

Pursuant to Section 1101(a) of the RTKL, “[t]he appeal shall state the grounds upon which the requester asserts that the record is a public record ... and shall address any grounds stated by the agency for delaying or denying the request.” 65 P.S. § 67.1101(a). When a requester fails to state the records sought are public, or fails to address an agency’s grounds for denial, the OOR properly dismisses the appeal. *See Saunders v. Dep’t of Corr.*, 48 A. 3d 540 (Pa. Cmwlth. 2012) (affirming OOR dismissal); Dep’t of Corr. v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011) (holding an appeal that fails to sufficiently specify the reasons for appeal should be dismissed rather than addressed by OOR).

In Department of Corrections, we outlined the sufficiency requirements for an appeal under Section 1101(a) of the RTKL. At a minimum, a requester’s appeal “must address any grounds stated by the agency ... for denying the request.” Dep’t of Corr., 18 A.3d at 434. We reasoned a minimally sufficient appeal is a condition precedent for OOR to consider a requester’s challenge to an agency denial.

More recently, in Saunders, we explained Section 1101(a) of the RTKL requires a requester “to state why the records did not fall under the asserted exemptions and, thus, were public records subject to access.” *Id.* at 543 (agency’s citation to various subsections of the RTKL, without explanation or application of exceptions, triggers requester’s burden to address exemption). Because Saunders failed to address the exemptions, we affirmed OOR’s dismissal of the appeal.

In this case, Requester did not state the records are public, or address the exemptions PSP cited in its response and verification. Requester stated merely that the RTKL exceptions do not apply without further explication. That does not satisfy the requirements of Section 1101(a) as we interpret that provision. Id.

Requester also did not address the agency's cited exemptions pertaining to the police report. Most notably, Requester did not discuss CHRIA, which pertains to criminal records. In fact, when he explained the reason he sought the records, Requester described them as criminal investigation records.

Requester emphasized he is entitled to the records as a party involved in the criminal investigation to which his Request relates. However, a requester's motivation for making a request is not relevant, and his intended use for the information may not be grounds for denial. *See* Section 301(b) of the RTKL, 65 P.S. § 67.301(b); Section 703 of the RTKL, 65 P.S. § 67.703. An explanation of why a requester believes an agency should disclose records to him does not satisfy the requirement in Section 1101(a) to explain why the requested records are public and available to everyone. To the contrary, Requester's explanation underscores PSP's criminal investigative defenses here.

We make no decision regarding Requester's alleged entitlement to the records under an alternate legal mechanism. Entitlement does not arise under the RTKL through which citizens have a right to access public records "open to the entire public at large." *See, e.g., Coulter v. Pa. Bd. of Prob. & Parole*, 48 A.3d 516, 519 (Pa. Cmwlth. 2012) ("home plans" of parolee requester are not accessible to her under RTKL though she is subject of records; to be accessible under the RTKL, identity of the requester is irrelevant).

Padgett at 647-648 (footnote omitted).

Where a record falls within an exemption under 67.708(b), it is not a public record as defined by the RTKL, and an agency is not required to redact the record and provide the remainder. 65 P.S. § 67.706, titled, “Redaction”, provides as follows:

If an agency determines that a public record, legislative record or financial record contains information which is subject to access as well as information which is not subject to access, the agency’s response shall grant access to the information which is subject to access and deny access to the information which is not subject to access. If the information which is not subject to access is an integral part of the public record, legislative record or financial record and cannot be separated, the agency shall redact from the record the information which is not subject to access, and the response shall grant access to the information which is subject to access. The agency may not deny access to the record if the information which is not subject to access is able to be redacted. Information which an agency redacts in accordance with this subsection shall be deemed a denial under Chapter 9. [65 P.S. § 67.901 *et seq.*]

65 P.S. § 67.706.

In Saunders v. Pennsylvania Department of Corrections, 48 A.3d 540 (Pa. Cmwlth. 2012), the Commonwealth Court stated in part:

Petitioner’s first argument addresses the sufficiency of the Department’s denial of his request. Petitioner contends that because the Department’s denial merely parroted the statutory language he was unable to properly respond to the Department’s assertion of exemption from disclosure. Section 903 of the RTKL, 65 P.S. § 67.903, states that a denial of access shall include, inter alia, a description of the record requested and the specific reasons for the denial, including a citation of the supporting legal authority. Correspondingly, Section 1101 of the RTKL, 65 P.S. § 67.1101, requires that a

party appealing a denial shall “state the grounds upon which the requester asserts that the record is a public record ... and shall address any grounds stated by the agency for ... denying the request.” See Dep’t of Corr. v. Office of Open Records, 18 A.3d 429 (Pa. Cmwlth. 2011).

The Department asserted that the requested records were exempt from disclosure under five different subsections of Section 708. Petitioner is correct in noting that the Department merely parroted the statutory language. However, the Department’s citations to the various subsections of Section 708 were sufficient to give him notice of the grounds for denial. Once the Department asserted that the requested records were exempt from disclosure under Section 708, Petitioner was required by Section 1101 to state why the records did not fall under the asserted exemptions and, thus, were public records subject to access. Petitioner failed to do so.

Petitioner’s argument that the Department was required to produce the requested records subject to redaction of the exempt information is without merit. Section 706 provides that if an agency determines that a public record contains information that is both subject to disclosure and exempt from the disclosure, the agency shall grant access and redact from the record the information which is subject to disclosure. Pursuant to Section 706, the redaction requirement only applies to records that are determined to be “public records.” A “public record” is defined in part as “a record, including a financial record, of a Commonwealth ... agency that: (1) is not exempt under section 708.” Section 102, 65 P.S. § 67.102 (emphasis added). Thus, a record that falls within one of the exemptions set forth in Section 708 does not constitute a “public record.” Dept. of Health v. Office of Open Records, 4 A.3d 803 (Pa. Cmwlth. 2010).

Saunders at 542-543 (footnote omitted).

In Heavens v. Pennsylvania Department of Environmental Protection, 65 A.3d 1069 (Pa. Cmwlth. 2013), the Commonwealth Court stated in part:

Furthermore, under the RTKL, records that are exempt under Section 708 or privileged are not considered public records and are therefore not subject to the redaction requirement contained in Section 706, which applies only to records that are public and contain information that is not subject to access. 65 P.S. § 67.706; Saunders v. Pennsylvania Department of Corrections, 48 A.3d 540, 543 (Pa. Cmwlth. 2012).

Heavens at 1077.

The RTKL provides that records of an agency relating to or resulting in a criminal investigation may be withheld as exempt. 65 P.S. § 67.708(b). The Respondent bears the burden of proving, by a preponderance of the evidence, that the documents requested are exempt from public access. 65 P.S. § 67.708(a)(1). A criminal investigative record is anything that contains information assembled as a result of the performance of any inquiry, formal or informal, into a criminal incident or an allegation of criminal wrongdoing. 18 Pa.C.S.A. § 9102. There is sufficient evidence to support the determination that the documents requested are criminal investigative records and exempt from disclosure.

CONCLUSION

For the foregoing reasons, the appeal is **DENIED**, and the Respondent is not required to take any further action. This Final Determination is binding on all parties. Within thirty (30) days of the mailing date of this Final Determination, any party may petition for review, to the Chester County Court of Common Pleas,

pursuant to 65 P.S. § 67.1302(a). All parties must be served with a copy of the petition. The Chester County District Attorney's Office shall also be served with a copy of the petition, pursuant to 65 P.S. § 67.1303(a), for the purpose of transmitting the record to the reviewing court. See East Stroudsburg University Foundation v. Office of Open Records, 995 A.2d 496, 507 (Pa. Cmwlth. 2010).

FINAL DETERMINATION ISSUED AND MAILED ON: July 11, 2017

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INDEX OF APPENDICES

APPENDIX “A” Appeal Documents Transferred from Office of Open Records.

APPENDIX “B” June 19, 2017 Letter of CDDA Nicholas J. Casenta, Jr., Esquire
Appeals Officer for DA’s Office of Chester County